No. 83-2004 (12)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

—v.—

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO RULE 22.6

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On January 4, 1985, the United States, pursuant to this Court's request for its views, filed a brief amicus curiae in support of the petition. That brief calls to the Court's attention vital considerations of antitrust and foreign trade policy which warrant the granting of certiorari in this case. On January 14, 1985, respondents submitted a supplemental brief in response to the Government's brief. Respondents' supplemental brief so mischaracterizes and misrepresents the views of the United States that petitioners are compelled to file their own response to the Government's brief, pursuant to Rule 22.6 of the Rules of this Court.

1. The brief for the United States plainly states that, among other things, the Court of Appeals' decision: (i) "has significant practical implications for both antitrust policy and the conduct of our nation's foreign trade policy" (U.S. Gov. Br. 6); (ii) "may tend to discourage foreign companies from engaging in vigorous price competition in the United States" (*id.*); (iii) "is likely to discourage district courts from resolving complex antitrust claims on motions for summary judgment in appropriate cases" (*id.*); (iv) "threatens to affect adversely the foreign policy of the United States" (*id.*); and (v) was wrongly decided. (*id.* at 6-7). Respondents' assertion that "[t]he Government essentially admits that this litigation is *sui generis*," and that "the Court of Appeals' decision has no important implications for either antitrust policy or foreign trade policy" (Resp. Supp. Br. 3.), is therefore demonstrably false.

2. The brief for the United States informs this Court that the United States Government, as well as seven foreign sovereigns, believe that the Court of Appeals' decision "threatens to do serious damage to the foreign trade relations of the United States." (U.S. Gov. Br. 18). In reply, respondents assert that the views of the United States on this issue are "bogus" (Resp. Supp. Br. 8), and that the official diplomatic protests of the Court of Appeals' decision by seven major trading partners of the United States are "trumped-up" and "orchestrated." (Resp. Supp. Br. 2.). Respondents have thus attempted to substitute rhetorical excesses and name calling for substantive analysis of the foreign policy implications of the Court of Appeals' decision, a subject on which the views of the Executive Branch should be accepted as authoritative. These ad hominem attacks upon the Government of the United States, and seven of its most important allies, are but another example of the implausible accusations which have been the core of respondents' conspiracy claims from the very beginning of this lawsuit. They should be rejected out of hand.

3. The brief for the United States correctly recognizes that the "direct" evidence relied upon by the Court of Appeals as a basis for dispensing with the *Cities Service* inference standard

"was 'direct' *only* with respect to agreements concerning resale prices in Japan and use of check prices (*i.e.*, minimum prices) and the five-company rule for exports to the United States." (U.S. Gov. Br. 9-10) (emphasis added). As the United States pointed out, such "agreements": (a) "did not have any necessary tendency to prove the alleged agreement to charge low, predatory prices in the United States, which the court of appeals found that respondents were required to prove in order to establish antitrust injury;" (b) at best, would constitute "circumstantial evidence" of this alleged conspiracy; and (c) thus "[do] not obviate the need for the central inquiry required by *Cities Service*"—whether the conduct alleged "was more reasonably viewed as the result of independent business decisions by petitioners than as the result of collusion." (*id.* at 10).[1]

There is thus no truth to respondents' contention that "the Government concedes there is *direct* evidence of petitioners' conspiracy" and that therefore the *Cities Service* inference standard should not be applied. (Resp. Supp. Br. 1, 5-6). Indeed, the so-called "direct" evidence relied upon by the Court of Appeals was not even circumstantial evidence of the "low price" export conspiracy that was alleged: the minimum check prices and five-company rule necessarily could have led only to higher export prices, while the two years of alleged "high" price stabilization in Japan was never shown to have *any* connection to the alleged agreement to charge predatory export prices to the United States. (U.S. Gov. Br. 10 and n.10; Pet. 14).

Respondents' repeated assertion that this analysis improperly "dismembers" their alleged unitary conspiracy theory

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1 Respondents contend that their "direct" evidence of conduct in Japan related not just to resale prices, but also to Japanese "ex-factory prices". (Resp. Supp. Br. 6 n.9). Even if such allegations were true, such behavior could, as the Court of Appeals recognized, at best serve *only* as "circumstantial evidence of [the alleged] broader conspiracy" to fix artificially low export prices to the United States. (Pet. App. 165a).

(Resp. Supp. Br. 6) is a non-sequitur. The conspiracy that the Court of Appeals held actionable by respondents under the United States antitrust laws is the alleged conspiracy to fix, not just high prices in Japan (which would not be actionable in the *United States*), nor *minimum* export prices (which would not be actionable by competitors like respondents), but predatory and artificially low export prices. There being no "direct" evidence of this, the only actionable aspect of the alleged unitary conspiracy, the *Cities Service* inference standard must be applied. (U.S. Gov. Br. 10-13).

4. The brief for the United States correctly points out that the petition raises pure questions of law which require this Court "to decide only whether the court of appeals failed to apply the proper legal standard in evaluating the evidence of conspiracy." (U.S. Gov. Br. 13 n.16). There is no truth to respondents' contention that review by this Court of the Court of Appeals' decision "necessarily" would entail examination of the "substantial factual record" below. (Resp. Supp. Br. 4).

5. The brief for the United States correctly notes that the Government of Japan has stated that it compelled two of the critical features relied upon by the Court of Appeals as a basis for its holding that a trier of fact can infer an actionable antitrust conspiracy (*i.e.*, the minimum price arrangements and five-company rule). (U.S. Gov. Br. 5, 14-20). Thus, contrary to respondents' contention (Resp. Supp. Br. 8), the Court of Appeals' failure to afford dispositive effect to these Japanese Government representations amounts to a holding that governmentally-compelled export controls can be a possible "predicate for liability" under United States antitrust law. (U.S. Gov. Br. 14-20).

6. Although the United States does not take an official position on respondents' Antidumping Act claims (U.S. Gov. Br. 11 n.12), it implicitly recognizes that the Court of Appeals' erroneous conspiracy analysis was the only basis for its finding of a genuine issue of specific predatory intent under the Antidumping Act (U.S. Gov. Br. 7 n.7)—a fact that renders

the Court of Appeals' Antidumping Act decision completely dependent upon its antitrust judgment. There is thus no truth to respondents' assertion that "the Government acknowledges . . . that respondents' claims under the Antidumping Act of 1916 . . . must proceed to trial *in any event*. . . ." (Resp. Supp. Br. 2 n.1) (emphasis added). To the contrary, the language from the Government's amicus brief quoted by respondents—that guidance by this Court on the conspiracy issue "would assist on remand in dealing further with the issue of specific intent in connection with the antidumping claims" (U.S. Gov. Br. 7 n.7)—refers only to a possible remand to the Court of Appeals *after a reversal* of its judgments by this Court (as is made clear from the text of the Government's brief to which this language is a footnote).[2]

7. The brief for the United States correctly rejects respondents' contention that "[r]eview by this Court limited to the first two questions of the petition could not alter the Court of Appeals' separate antitrust judgment below" because the "expert opinion evidence of conspiracy sufficed by itself to defeat petitioners' summary judgment motions." (Resp. Supp. Br. 10). Thus, the United States expressed the view that if, as it is urging, this Court should reverse the Court of Appeals' failure to apply the *Cities Service* inference standard, it "would be proper . . . to conclude that the district court's grant of summary judgment in favor of petitioners on the antitrust claims should be affirmed." (U.S. Gov. Br. 7). Respondents' contrary assertion, that expert testimony "that petitioners conspired" can by itself defeat summary judgment, even if

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2 Moreover, as the District Court has pointed out, respondents have not claimed, or attempted to prove, injury or damages from any alleged *individual*, non-conspiratorial conduct by petitioners, whether in violation of the 1916 Antidumping Act or otherwise. (Pet. App. 653a-654a n.396). Indeed, Zenith's Chairman, John Nevin, expressly testified that Zenith was not claiming any such damages in this case and not pursuing any individual dumping claims. (*id.*). Accordingly, contrary to the contention of respondents' counsel, no individual Antidumping Act claims remain to be tried if the antitrust judgment of the Court of Appeals is reversed.

respondents' conspiracy evidence fails to satisfy the *Cities Service* inference standard (Resp. Supp. Br. 10), would, if accepted, nullify all of this Court's well-established limitations on the inference drawing process. This Court should grant certiorari on Question 3 of the petition to affirm that this is not the law. *See United States* v. *Various Slot Machines*, 658 F.2d 697, 700-01 (9th Cir. 1981); *Merit Motors, Inc.* v. *Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977).[3]

8. Federal trial courts must not be deprived of the case management tools necessary to terminate the type of baseless litigation that this fourteen year old case represents. This Court should grant certiorari in order to: (i) affirm that antitrust plaintiffs seeking to infer a conspiracy may not evade this Court's *Cities Service* inference standard, especially as it applies to the type of implausible conspiracy allegations advanced by respondents in this case; (ii) apply the sovereign compulsion and act of state doctrines to prevent the serious encroachment upon United States foreign trade relations that has been attested to by the United States Government and seven of its major trading partners; and (iii) affirm that expert testimony based upon false and unsupported assumptions is not sufficient to defeat summary judgment in an appropriate case.

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3 While each of the Questions presented by the petition provide an independent basis for granting certiorari and reversing the judgments of the Court of Appeals, it is respectfully submitted that this Court should grant certiorari on all of the Questions presented by the petition, despite the neutral position of the United States with respect to granting certiorari on Question 3. (U.S. Gov. Br. 6 n.6). Question 3 raises issues of substantial concern to the administration of justice, and to the ability of federal trial courts to use summary judgment as a case management tool in appropriate cases involving expert testimony, which in and of themselves warrant granting certiorari on this point.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: January 23, 1985

Respectfully submitted,

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